IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5142 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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PATEL BHIKHABHAI CHHAGANBHAI
Versus
THE DY.EXECUTIVE ENGINEER

Appearance:
1. Special Civil Application No. 5142 of 1987
MR RN SHAH for Petitioners
MR RC KODEKAR, AGP for Respondent No. 1-5

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE J.R.VORA

Date of decision: 23/08/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI)

1. The petitioners have challenged the notice dated 24th February 1987, at Annexure "E", by which the Deputy Collector made an order releasing the lands of survey Nos.161 part, 162 part, 163 part and 164 part, from acquisition and directed recovery of the compensation amounts Rs.8,300=00 in respect of survey No. 163 and Rs.21,400=00 in respect of survey No.164.

2. According to the petitioners, the lands were acquired on the basis of notifications issued under sections 4 and 6 of the Land Acquisition Act, 1894, on 16-12-1983 and 5-11-1984, respectively. By the notification issued under section 6 of the Act, it was declared that the lands were required for the public purpose specified in column (4) of the Schedule which was for Majam Dam Yojna. It was categorically stated in paragraph 2 of the petition that the lands of the petitioners were acquired and possession was also taken by the respondents and the lands have vested in the Government. The name of the government had been entered in place of the petitioners in the village record.

3. It was strongly contended on behalf of the petitioners that once the possession had been taken over and 75% of the compensation was paid to them by the respondents, the lands cannot be withdrawn from acquisition under section 48 of the said act.

4. The contention raised on behalf of the learned Assistant Government Pleader appearing for the respondents was that the State Government was empowered to release the land from acquisition under section 48(1) of the Act and recover the amount paid by way of advance compensation. It was also submitted that, after the issuance of notices under section 9 of the said Act, the petitioners had stated that they were not willing to give their remaining lands for acquisition. This fact is strongly refuted in the rejoinder filed by the petitioners.

5. The moot question is as to whether the government was at liberty to withdraw from the acquisition of the land of which possession was taken over. It appears from the record that the provisions of section 17 of the said Act, which required tender of payment of 80% of the compensation for such land before taking possession were resorted to in respect of these lands. Under section 17(1) of the act, in such cases of urgency, though no

award was made, the State Government was empowered on the expiry of 15 days from the publication of the notice mentioned in section 9(1) to take possession of any land needed for a public purpose. Thus, the very purpose of invoking section 17 was to take over possession by offering advance compensation. The respondents have tried to circumvent clear assertion of the petitioners that the possession of their lands was taken over while invoking the provisions of section 17 of the Act, by merely stating in paragraph 7 of the affidavit-in-reply that "legal possession of the suit lands has not been taken". It is also asserted that since the award was not declared and the lands were released from acquisition, there was no question of now declaring an award. It thus appears that notices under section 9 of the Act were issued and thereafter, under the provisions of section 17, urgency clause, was pressed in service for taking over the possession and 75% compensation was paid, as contemplated by sub-section 3(a) of section 17 of the Act.

6. Though the respondents had asserted that the land was withdrawn from acquisition by consent of the petitioners, they have not been able to place on record any material to show whether such consent was given. In fact, on 24-3-1988, as recorded in the order made by this Court, the advocate appearing for the respondents Nos. 1 to 5 had stated that he would be producing on record to show that only with the consent of the parties, the acquisition was withdrawn and for that purpose, the matter was adjourned to 29-3-1988. Uptill now, no such material has been placed on record. It is, therefore, obvious that the possession of the land was taken over by invoking the provisions of section 17 of the said Act. It is not disputed that section 17 of the Act was pressed in service in this case and advance compensation was in fact paid under sub-section (3) of section 17 of the Act, which is now sought to be recovered from the petitioners on the ground that the land is withdrawn from acquisition under section 48 of the Act.

7. Under section 48 of the Act, it has been provided that, except in the case provided for in section 36 (relating to temporary acquisition), the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken. It is therefore clear that the Government could not have withdrawn from acquisition of the said land, the possession of which was taken over by invoking provisions of section 17 of the Act and making advance payment of compensation. It also appears that no procedure under

section 48(2) of the Act was ever followed as is required to be done when the Government withdraws from such acquisition.

7.1 It has been held by the Supreme Court in Awadh Bihari Yadav v. State of Bihar, reported in AIR 1996 SC 122 that, where government had taken possession of the land in question under section 17(1) of the Act, it is not open to the government to withdraw from the acquisition under section 48 of the Act. (See paragraph 8 at page 125). A Division Bench of this Court in Trustees of Bai Smarth Jain Shvetambar Murtipujak Gyanoddhaya Trust v. State of Gujarat, reported in AIR 1981 GUJ 107, while construing the provisions of sections 17 and 48 of the Act, held that the expression "to withdraw from the acquisition of any land of which possession has not been taken," used in section 48 has reference to sections 16 and 17, under which on taking over of the possession either after the award or before making the award as contemplated under those provisions, the lands would vest absolutely in the Government, free from all encumbrances. The Government by simply withdrawing from acquisition cannot divest of its title and return it to its original owner. Therefore, when section 48 speaks of possession not having been taken, it has reference to the title not having vested in the State Government and section 48 cannot be invoked in cases where the title has been vested in the State Government either under section 16 or under section 17. In the present case, the title had vested in the State Government under section 17, which admittedly was invoked in respect of these lands. The impugned order dated 24th February 1987, at Annexure "E" purporting to have been made under section 48 of the act is, therefore, wholly misconceived and unwarranted by the provisions of section 48 of the Act. The impugned order is, therefore, hereby set aside, with a direction to make the award. Rule is made absolute accordingly with no order as to costs.

[R.K.ABICHANDANI, J.]

[J.R.VORA, J.]

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